Legal Services for Indigent Criminal Defendants in Central and Eastern Europe

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Subject to this report[1] are six countries from Central and Eastern Europe: Bulgaria, the Czech Republic, Hungary, Poland, Romania and the Slovak Republic. The total population of these countries is nearly 90 million, approximately 65% of which live in urban areas.[2] The legal systems of the countries under survey have undergone radical changes since 1989/90, and their transformation, has not been completed.

I. THE ORGANIZATION OF THE ADMINISTRATION OF JUSTICE

A. The Judicial Branch

The independent and impartial judiciary is a basic pillar of a democratic state observing the rule of law. The preconditions of independence and impartiality are guaranteed by the constitutional provisions on the judicial power and by the laws regulated the organization, structure and operation of the courts. The judicial branch is declared to be independent from the executive and the legislative.

The principle of independence of the judiciary is embodied in the Constitutions of the countries under review. Alongside the classical guarantees of independence - judges are irremovable and subject exclusively

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[1] This report is based on the country reports on Bulgaria, written by Yonko Grosev and Vessela Terzieva; the Czech Republic by Mark Thieroff and Miroslav Krutina: Hungary by Károly Bárd ; Poland by Wojciech Hermelinski; Romania by Monica Macovei and the Slovak Republic by Bohumir Blaha and is limited to information provided there. The report on the Slovak Republic is not reproduced in this volume.

[2] The population of Bulgaria is 8,340,775 citizens, of the Czech Republic - 10,300,000, of Hungary - 10,174,000, of Poland - 38,659,000, of Romania - 23,000,000 and of the Slovak Republic - 5,378,000.

to the law - specific safeguards have been introduced in the nomination procedure. As a general rule, judges are appointed by the Head of the State,[3] whereas the right to nominate is exercised by the newly established autonomous superior judicial bodies (the National Judicial Councils/NJC) or is shared between the Minister of Justice and the autonomous bodies of judges organized at the different levels of the court system.

The setting up of the National Judicial Councils clearly reflects the endeavor to strengthen the independence of the courts. They took over the role of managing the court system from the Ministry of Justice, and they assume the tasks related to the administration of the courts, such as control over the administrative activity of the presidents of the courts, preparation of the draft budget for the judicial system, and personnel policy within the judicial branch.

In Hungary, the judicial system comprises only the courts, whereas in Bulgaria the judicial branch comprises not only the courts, but also the prosecutors and the investigators, thus representing the other extreme. In Romania both the courts and the prosecutor's offices form part of the judiciary. However, the prosecutors' status is distinctly different from that of the members of the judiciary proper, as they lack independence and may be removed. Therefore, there is some fear that by mixing within the same organization independent judges and subordinate prosecutors, the very substance of the independence of the judiciary as a whole might be endangered. Actually, the similar organizational status of judges and prosecutors may mean that the competence of the prosecutors is extended to decisions which in other jurisdictions are exercised solely by judges. In Hungary, for instance, where judges are separated from prosecutors, only courts may order pretrial detention or wire taping, while in Romania similar decisions may be made by the prosecutors.

B. The Court System

The years 1997 and 1998 mark significant changes in the court systems in some of the countries subject to this report. The most important alteration is perhaps the (re)introduction of the four-level court system in a number of countries.[4]

[3] In Bulgaria judges are elected by the Supreme Judicial Council.

[4] In 1997 the four tier court system was enacted in Hungary; in Bulgaria this system, enacted in December 1997 will enter in force after 1 April 1998, while in the Czech Republic, Poland and Romania the four tier system has been in existence for some years.

The first instance competence is divided between the lowest (local or district) and the regional (county) courts, the latter acting at the same time as the appellate instance when judgments of the lowest courts are appealed. The superior courts (courts of appeal or higher courts) act as appellate instances in case of remedies sought against the regional courts' judgments or when extraordinary remedies are petitioned for, and maintain the uniformity of judicial practice.[5]

In most countries, it is exclusively the Supreme Court which has the particular function of ensuring the uniformity of court practice. They perform this task through special arrangements (interpretative decisions, etc.), through deciding as the final appellate instance in individual cases and through ruling on extraordinary remedies. In the Czech Republic, for instance, the Supreme Court decides on the so called "breach of law complaints" submitted by the Ministry of Justice, whereas in Hungary review procedure can be initiated before the Supreme Court by both the prosecution and the defense.[6]

In the Slovak Republic, the three level court system is maintained in which the competence of the first instance is divided between the district (local) and the regional courts, the latter proceeding in more serious cases as trial courts and deciding on appeals against the first instance decisions of the district courts. The Supreme Court acts as appellate court when first instance judgments are passed by regional courts.

Military courts organized on the regional (county) level exist in Bulgaria, Romania and the Slovak Republic and are competent primarily to try criminal offenses committed by military and police personnel. In Slovakia, military courts may also try crimes committed by civilians in cases of espionage and disclosure of state secrets provided that military interests are affected as well as in cases of refusing to take up military service. In Hungary, military courts as separate courts were abolished after the political changes, military panels, however, operate within the county courts deciding on military offenses committed by members of the armed forces and the police.

[5] In the Czech Republic, two Higher Courts rule on the decisions of the Regional Courts and they also are entrusted with the task of ensuring uniform judicial practice.

[6] In Bulgaria, a Supreme Administrative Court is being established to rule on appeals against acts of administrative bodies already challenged before the Regional Court, and to divide as a first instance court on acts of the Council of Ministers and Ministers. A Chief Administrative Court exists also in Poland.

Summing up, the transformation in the organization of the administration of justice, primarily the shift from the previously existing three-tier structure to the four-level court system has serious implications as regards access to courts as well. The setting up of the four-tier court system results in the transformation of the appeal system. The introduction of additional remedies provides not only better guarantees for the defendants in the criminal process, but at the same time makes the system more complicated. Under these conditions legal expertise becomes vital and the variations in access to attorneys combined with significant differences in the performance of appointed counsel and those on retainer result in considerable differences as regards access to the courts.

The Constitutional Courts set up in the region in the course of the political transformation are significant protectors of human rights; however, thorough legal skills are often required to argue before them. It is not by chance that in the Czech Republic, for instance, only professionals (i.e. attorneys) are allowed to submit motions to the Constitutional Court. Thus the procedure of the Constitutional Courts may further widen the gap between the wealthy and the indigent as concerns access to justice.

C. *The Prosecuting Agency*

It is the prosecutor's offices which have the task to formulate the indictment and to bring and represent charges before the courts, except in instances of private prosecution. Prosecutors supervise the activity of the police or other investigating agency in the pretrial stage of the process and, in addition, they themselves investigate crimes specified by legislation, if successful investigation calls for particular skills which only prosecutors possess or if for some other reason police involvement is not desirable. Prosecutors monitor compliance with legal provisions at places of detention and check how sentences of the courts are enforced. They have certain competences in civil and administrative litigation if state property is at stake and they may act on behalf of persons who, due to mental or physical disabilities, are unable to enforce their claims.

The organization of the prosecutor's agency corresponds more or less to the court structure: there is a corresponding prosecutor's office at each type of court. The prosecution agency is a hierarchical organization headed by a Chief (General) Prosecutor. Superiors may give orders and instructions to lower level prosecutors and may suspend or annul their decisions; remedies are available within the organization, and decisions of prosecutors can be appealed before the higher level prosecutor.

As a general rule, acts of the prosecutors cannot be appealed before a court except for decisions on detention where it is not in the exclusive competence of the court to order detention. In case of a decision on non-prosecution (refraining from bringing the case before the court) the court, as a general rule, may not be invoked. In Hungary, according to the new CCP the victim may, under certain conditions, replace the public prosecutor and enforce the court procedure.[7]

In some of the countries the prosecution agency has been subordinated to the Government via the minister of justice, but in the majority of the countries under review the former status has been maintained. Accordingly, the prosecution agency as an organization is independent from the executive and the Chief Prosecutor is responsible solely to the Parliament.

The situation is somewhat confusing in Romania, as outlined in the country report. On the one hand the prosecution agency is directly subordinated to the Minister of Justice but on the other hand, prosecutors lacking the attributes of judges (independence, non-removability, etc.) form together with the judges the *magistrature*.

Prosecutors are obliged to perform their functions in an objective and impartial manner. Their task is not solely to collect evidence that may lead to conviction but, following the Continental pattern (and the communist theory according to which they acted as the "guardians of legality"), they are expected to look into the extenuating and mitigating factors as well. Empirical research and everyday practice, however, clearly indicate that their function as persecutors and as guardians of the defendant's rights and interests can hardly be reconciled. Even if the command of the legislator to act in an unbiased manner may have beneficial impact on prosecutors' behavior one may wonder to what extent the myth of prosecutorial impartiality contributes to the fact that decision makers feel themselves relieved of caring for the proper performance of defense attorneys in the pretrial stage.

D. *The Investigation Agency*

In the Czech Republic, Hungary, Poland, Romania and the Slovak Republic the investigative offices are with the police which assume the main role in preliminary investigation. The police as a law enforcement agency with a hierarchical organization operates under the Ministry of the Interior. In Bulgaria investigators form part of the judicial branch and the police have

[7] The victim, if the court approves his or her request, may act in this case as subsidiary private prosecutor.

no formal investigative powers, and the steps they can take on their own initiative in the formal criminal process are considerably limited.

E. Attorneys and Bar Associations

Attorneys perform their activity within Bar Associations. The Bar is independent and autonomous. Its organization is established by special laws which also define the role attorneys play in the administration of justice. Accordingly, attorneys assist citizens and legal entities in the protection of their fundamental rights and freedoms in various forms and grant legal aid.

Any lawyer may act as an attorney if registered in a local Bar Association. The laws on the Bar require several conditions to be met for registering a candidate: citizenship of the relevant country, graduation from a law school, a certain period of practice (two or three years) as an attorney trainee followed by a special exam and clean record are the general requirements for application.

Bar Associations are organized according to the territorial principle. They are autonomous bodies protecting the rights and interests of their members. The organizational structure of the Bar and the competence of its different organs is more or less the same in the countries under review. The most powerful body is the General Assembly which decides on policy issues and the most important personnel questions.

Each Bar Association has governing bodies (Bar Council, Control Council or Chamber), empowered with executive functions such as the preparation of the draft budget, execution and accounting of the budget. These bodies are also responsible for designating a particular attorney to represent a client entitled to free legal representation, if the relevant procedural norms so require.

With each Bar Association a disciplinary court (commission) is established to rule on complaints of breaches of ethical standards by lawyers. If the court finds the complaint well-founded, it may reproach the lawyer, impose a fine on him/her or deprive him/her of the right to practice temporarily or permanently (Bulgaria, the Czech Republic). A decision of the Disciplinary Court can be appealed to the Disciplinary Court of the National Bar. In some countries the disciplinary body is exclusively composed of attorneys, while in others mixed panels decide. In Hungary, for instance, the panel, in addition to attorneys, includes as members also judges and the chairperson of the panel must be a judge. The participation of "outsiders" provides protection not only for the attorney proceeded against but also for clients who allege to have received inadequate services.

The members of the local Bar Associations elect the national governing bodies and the national disciplinary court (disciplinary commission). The supreme executive bodies adopt regulations on professional ethical standards and set minimum attorney's fees. They may also give comments on draft legislation.

The Bar performs its function independently and autonomously, the autonomy being protected also by certain procedural safeguards. In Romania, the search of an attorney's office may be ordered only by the prosecutor and it has to be approved by the head of the county prosecution office. According to the new CCP in Hungary it is in the exclusive competence of the court to order the search of attorneys' offices.[8]

However, in many countries the executive has certain powers as concerns the activity of attorneys. In the Czech Republic, for instance, all the regulations, once adopted by the Chamber, should be submitted to the Minister of Justice who would submit an action for their examination by a court if he finds them to run counter to legislation. In Hungary the Minister of Justice has certain supervisory powers to check the formal legality of the decisions taken by the Bar's governing bodies.

As to the implications of the organization and the composition of the Bar for the services provided for indigent defendants we may say that it is perhaps the Bar which has undergone the most significant modifications following the political changes in the region. The *numerus clausus* was removed and the number of attorneys has increased considerably. New members of the Bar were recruited from among former judges and prosecutors as well as jurists previously employed by the local administration or state owned companies. As a consequence many new attorneys have absolutely no experience in criminal law matters. This is particularly the case of countries where practicing lawyers form a uniform profession and are all members of the same Bar. In some of the countries of the region (e.g. in Poland) the former division between attorneys who are members of the Bar and so called legal advisers, who are usually employees of business enterprises and who are not authorized to take criminal cases, has been maintained.

As in the majority of the countries under review attorneys form a uniform profession and in theory all members of the Bar have the duty to act on appointment, the relatively high number of attorneys inexperienced in criminal cases contributes considerably to the poor functioning of the mechanism of ex officio appointment. As reported from a number of

[8] The same rule applies to the notaries' offices and to medical institutions.

countries ex officio attorneys frequently try to relieve themselves of the duty they find troublesome by referring to their other commitments, their heavy workload or sometimes to their lack of competence.

F. The Role of the Ministry of Justice

As indicated above, in the majority of the Central and Eastern European countries the administrative functions previously exercised by the Ministry of Justice and providing for interference with the operation of the courts have been taken over by independent and autonomous judicial bodies and, as regards the Bar, the role of the Minister of Justice has been weakened. However, there exist certain differences among the countries: in the Czech Republic the Minister of Justice, in addition to the right of initiating Supreme Court actions by submitting the so called "breach of law" complaints, still has the right to assign and transfer judges (although only with their consent) and has considerable powers vis-à-vis the Bar as well (control over the legality of professional regulations, the issuing of the disciplinary code of the Bar). However, in the majority of cases, when exercising his functions, the Minister's status is like that of a party: he may submit the professional regulation to judicial review in case of its alleged violation of the law, he may act as the prosecutor in disciplinary proceedings against members of the Bar and may make submissions for the removal of individual attorneys from the register of advocates.

II. THE CRIMINAL PROCESS

A. General

According to the Continental tradition the rules governing the criminal process are laid down by the legislator in details and therefore little room is left for judicial interpretation. Under the present conditions of transition, however, the countries' highest courts are sometimes called upon to fill the gaps in legislation. In Romania, for instance, the Supreme Court was called upon to decide on a number of questions concerning the right to counsel. Thus the Supreme Court ruled that the failure to inform the defendant of his or her right to a defense counsel would annul the investigation activities and the case had to be turned back to the prosecutor's office for re-investigation. It was the Supreme Court which ruled that the absence of a defense attorney at a hearing on pretrial detention results in the nullity of the case and has to be sent back to the prosecutor for re-investigation. The Bulgarian Supreme Court also had to decide a number of crucial questions related to the right to defense. Thus, it ruled that it is the age of the defendant at the time of the perpetration of the criminal offense which makes defense mandatory and not his age at the time of the commencement of the criminal process. Further, the

Supreme Court passed a judgment in 1996 on the state's obligation to provide for the assistance of an attorney even outside the cases of mandatory defense in spite of the lack of an explicit provision on the matter in the CCP.

The reluctance of the investigative authorities to follow the Supreme Court's latter ruling and the criticism of the Court's decision by jurists who refer, among others, to the lack of financial resources indicates that judicial activism is enclosed within the limits in the region has a limited impact, and legislative measures are required for the reform to be successful.

B. Fundamental Rights in the Legal System of the Central and Eastern European (CEE) Countries

The Constitutions or other basic laws (charters) declare the fundamental rights of individuals and list among them a number of rights and guarantees which are of relevance for the administration of justice in criminal cases. These guarantees more or less overlap with the rights listed in international human rights treaties, which is partly due to the fact that the countries under review are parties to the respective general and regional treaties. The rights guaranteed by the Slovak Constitution are representative for the rest of the countries. Accordingly, the right to legal assistance, public trial to be conducted in a reasonable time by a court established by law, the *nullum crimen* and *nulla poena* principles, the presumption of innocence, the right to have adequate time for preparing one's defense, the privilege against self-incrimination, the double jeopardy guarantee (*ne bis in idem* rule), the prohibition of depriving the individual of his or her personal liberty save in cases and in a procedure laid down by law, the right to be informed promptly of the reasons of detention, and the right to be brought immediately before a judge are among the fundamental rights guaranteed by the Constitutions or other basic laws of the countries under review.

As to the relationship between international human rights law and domestic legislation, the Constitutions of some of the countries, such as Bulgaria, the Czech Republic and Slovakia explicitly give priority to international treaties.

As indicated in the Czech report, international human rights treaties are incorporated into domestic law and have priority over domestic laws. Also the case law of the organs setup under the European Convention of Human Rights (ECHR) and under the International Covenant of Civil and Political Rights (ICCPR) form part of domestic law and may therefore be invoked before all national courts. However, according to the report, the case-law of the ECHR and the ICCPR organs are almost never considered in ordinary

courts, despite the self-executing nature of the mentioned treaties under Czech law.

Yet there are examples when the case law of international human rights organs has a direct impact on the application of domestic law. In Poland, for instance, in contrast to the present CCP which contains no provision on the attorney's right to be present at the court hearing before a decision on pretrial detention, a new CCP which is to enter into force in the course of 1998 does contain this right, which is derived from the case law of the Strasbourg organs.

C. *The Significance of the Pretrial Stage of the Criminal Process*

The criminal procedure of the countries in Central and Eastern Europe more or less follow the Continental pattern. In contrast to the common law system, the first phase of the procedure, the investigation, is of utmost importance since the collected information is fixed in a file, the so called dossier which is then submitted to the court. Information included in the file can be heavily relied on by the trial court when passing its judgment.

Consequently, what happens during the pretrial stage will have crucial impact on the final judgment of the court. That is why it is of extreme importance that the defendant receive proper assistance in the pretrial stage and right after the commencement of the criminal process. On the level of the Constitutional provisions and the general principles laid down in the laws on criminal procedure the situation seems to be satisfactory; the laws usually guarantee the defendants' right to obtain the service of a defense attorney from the very commencement of the criminal process.

However, certain detailed provisions weaken the general rule. In most countries the rights of the defendant may be curtailed in the very first stage after the commencement of the formal criminal process, including the period of police custody that precedes the pretrial detention which is ordered by the court. In Poland, for instance, the prosecutor may allow the defendant to meet his lawyer but he may also order that the meeting take place in the presence of the prosecutor. (Even the new code entitles the prosecutor to control the communication between the lawyer and the client in the very first stage (the first 14 days) of the criminal process.) The position of those in police custody is weakened also by the fact that in some countries, like in Hungary, no appeal to the courts is envisaged, and the individual may complain to a higher level police officer or to the prosecutor.

Certain forms of abusing the gap in the law are mentioned in the Romanian reports; however, it is more than likely that the practice described

therein is widespread in other countries as well. Accordingly, it frequently happens that individuals are being questioned for hours by the police before a police custody order is issued. The reason why police prefer interrogation before formally taking the individual into custody is that the guarantees suspects are entitled to when placed in police custody (the right to counsel among them) do not apply.

D. *Detention Prior or Outside the Formal Criminal Process*

The legal systems of the countries under review authorize the police to deprive individuals of their personal liberty outside the criminal process. Detention in such cases serves the aims of public security and prevention, and the guarantees of the individual concerned, partly because of the relatively short duration of the detention, are considerably weaker than in the case of deprivation of liberty within the formal criminal process. In some of the countries counsel is not available and detention may not be challenged before a court. In other countries legislation provides for adequate guarantees but failures to comply with the rules have no serious consequences for those who violate them.[9]

This type of deprivation of liberty considered as administrative detention and regulated normally in the laws on the Police may last generally no longer than 24 hours. The grounds on which a person may be arrested by the police on their own initiative are specified in the relevant laws on the Police, but some of the grounds are subject to a broad interpretation. In Bulgaria, for instance a police officer may detain a person who has committed an offense, or after being warned deliberately hinders the police from performing their duties; juveniles who have left their home, or persons who can not be identified may be detained as well. In Romania the administrative detention can be grounded on identity check or on the suspicion of endangering public order or any social values.

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[9] In Bulgaria both the Constitution and the Police Act provide for the right to a lawyer for a detained person from the moment of detention. The Police Act also provides for judicial control over the police detention. There are no consequences for a police officer who fails to secure the right to counsel to the detained person. Nor is there a procedure for judicial review within 24 hours from the moment of arrest. In Romanian legislation there is no provision securing the right to counsel of the detained person and the right to judicial review over the police custody at all. This issue raises questions of compatibility of the administrative custody with the Romanian constitutional provisions. In the Czech Republic the Police Act does not recognize the notion "detention" and instead uses the term "holding" for up to 24 hours, thus practically giving no possibility for the police detention to be challenged before a court.

The lack of adequate safeguards leads, on the one hand, to the absurd situation that individuals not even reasonably suspected of having been engaged in activities prohibited by criminal law are left practically without any protection and, on the other, seriously affects the position of would-be defendants.[10] The principle of free evidence is interpreted in some countries to allow for the use of information obtained outside the criminal process as well. In Hungary, e.g. statements made prior to formal criminal investigation in an administrative procedure without adequate safeguards and without the assistance of counsel may be used as a general rule by the investigating agencies and the courts in subsequent criminal proceedings.[11]

E. Pretrial Detention Under the Law of Criminal Procedure

When detaining a person in the course of a criminal proceeding, two conditions have to be met: formal criminal proceedings have to be instituted and the charge has to be communicated to the person proceeded against.

Criminal procedure commences, at least in public prosecution cases, with the investigation. In order to institute an investigation, specific requirements have to be met. As a general rule, there must be reasonable suspicion that a criminal offense has occurred: according to the Bulgarian CCP, sufficient evidence that a crime has been committed is required; in Hungary, criminal investigation can be started upon the existence of "reasonable suspicion" that a criminal offense has taken place; in the Czech Republic preliminary proceedings are carried to find out whether a suspicion is justified to such an extent that the case can be brought to a court.

[10] A striking example of using detention outside the criminal process for purposes of criminal investigation is referred to in the Romanian report. The 1970 law on the protection of minors authorized the agencies to deprive of liberty those young people who were "exposed to committing crimes or whose vicious or immoral behavior could have been spread among other young people." The law was used by the police to detain minors and by abusing the lack of adequate guarantees (the right to defense counsel and other safeguards protecting pretrial detainees) to collect evidence against them. The law was abrogated by the Government in 1997.

[11] In Bulgaria, on the contrary, no statements made outside the preliminary investigation or the trial may be used as evidence by the courts. In Hungary, the new law on criminal procedure may result in considerable changes in this respect. The use of evidence obtained prior or outside the formal criminal process is limited to documentary and physical evidence and section 78, para. 4 provides for the exclusion of, among others, evidence obtained "through the considerable restriction of the procedural rights of the parties."

The bodies authorized to institute criminal proceedings are the prosecutor[12] in Bulgaria, the police in Hungary and an investigator of the police authority in the Slovak Republic.

If in the course of the criminal proceedings sufficient evidence is collected indicating that a specific person has committed the offense, a formal charge has to be brought against the defendant[13] immediately. The officer responsible for bringing the charge (the investigator or the prosecutor, respectively) has to inform the suspect of the grounds for the accusation (this is considered to be a brief description of the facts supporting the allegation of committing a crime and citation of the relevant sections of the criminal code) and of the rights the accused is entitled to from that moment onwards. As to the evidence supporting the accusation, the relevant provisions are broadly formulated and thus give possibility for the investigator not to disclose evidence if required in "the interests of the investigation."

After the formal charge has been brought in the course of the investigation, the individual may either be left at liberty or detention on remand (pretrial detention) may be ordered. The suspect in police custody may also be released on bail or on probation in some jurisdictions. In a number of countries decision on pretrial detention in the course of the investigation rests with the prosecutor;[14] in some others only the court may order pretrial detention.

In countries where pretrial detention is ordered by the prosecutor, the decision can be appealed to a court. According to the Bulgarian CCP a detained person is entitled to challenge the lawfulness of his detention in a court within seven days of his arrest. Court hearings are to be scheduled no later than three days. The court decision may not be further appealed. The number of appeals for release on bail or on probation is not limited. In Romania the accused is entitled to appeal in court against the lawfulness of his detention on the very day it is ordered. This right can be exercised only once. The court's decision on the legality of the detention is subject to appeal by both the accused and the prosecutor. Appeals for release on bail or on

[12] If the matter is urgent, the investigator may institute criminal proceedings.

[13] The Hungarian CCP states for "well founded suspicion," while the Romanian CCP uses the term of "well grounded evidence or indications" and the Slovak CCP requires "credible facts" to be discovered for a person for having committed a crime.

[14] In Romania the pretrial detention may be ordered for 30 days by the prosecutor, beyond which decision of a court is required. In practice the courts do not review the decision on detention every 30 days unless release is explicitly demanded.

probation during the investigation, however, may be filed only with the prosecutor only. In the Slovak Republic the detainee may file new applications for release on bail 14 days after his/her previous application has been rejected.

When ruling on the lawfulness of the detention or on a request to release on bail or on probation, the courts are to summon both the accused and the prosecutor. The hearings are to be adversary in nature and the detained person is entitled to the presence of his defense counsel. To secure this right in Poland, the president of the Regional Court demands the District Bar Association to appoint attorneys to work in the court buildings in order to provide legal assistance for detained individuals. Nevertheless, the rules on the hearings are not strictly observed in all the countries and there are no consequences in case of their infringements.[15]

The duration of the preliminary detention is limited in Bulgaria and the Slovak Republic. In Bulgaria the detention on remand during the preliminary investigation cannot exceed one or two years, respectively; the latter time limit is applicable to crimes punishable by deprivation of liberty for more than 15 years, life imprisonment or death. In the Slovak Republic preliminary detention can be ordered for a period of six months. When this term expires, the judge may, upon the suggestion of the prosecutor extend the detention up to one year and the Senate of the court to two years respectively, if the release of the accused would hinder the investigation. The period of the detention during both the preliminary investigations and the trial hearings in the Slovak Republic is limited to a term of maximum two years. In exceptional circumstances (such as difficulties in the investigation and other very important reasons), the Supreme Court may extend the detention to one more year.

Certain final time limits are also provided for: in Hungary, pretrial detention may not exceed the duration of imprisonment imposed by the first instance court,[16] whereas in Romania pretrial detention has to be terminated if the time already spent comes up to half of the maximum sentence prescribed for the individual offense.

[15] This is reported, for instance, from the Czech Republic.

[16] According to the new Hungarian CCP pretrial detention may not exceed three years. This rule, however, applies up to the completion of first instance proceedings only; in the appeal stage the defendant may be kept in pretrial detention even if the three-year term has already passed. The provision according to which pretrial detention may not exceed the term of imprisonment imposed by the first instance court is maintained.

F. Detention Without Formal Charge

Pretrial detention as outlined above requires that the individual be charged formally with a criminal offense. However, individuals may be deprived of their liberty within the criminal process for a relatively short period of time without being formally charged. In Bulgaria, for example, the investigator may order arrest for up to 24 hours (this term under special circumstances may be extended by the prosecutor up to three days) if a person was apprehended while committing a crime, or if there are signs of a crime on the person's body or cloths, or if he is identified by a witness as a person who committed a crime. According to the Hungarian CCP a person can be arrested if apprehended while committing an offense, provided that his identity cannot be established or when the preconditions of pretrial detention exist and there is no time to obtain a warrant. Under these circumstances the arrest may be ordered either by the police or the prosecutor, although in practice it is ordered mainly by the police. In Poland the grounds for detention without a charge give room for broad interpretation: a person may be arrested by the police if there is a justified suspicion of an offense committed by this person and if there is a fear that the person may go into hiding or destroy evidence. In the Czech Republic detention without a charge is justified in emergency situation; there is no difference between the grounds for arrest with or without a formal charge.

If no evidence is gathered supporting the suspicion the detained person should be released within the time limits provided by the laws on criminal procedure (24 hours or three days, respectively, in Bulgaria, 72 hours in Hungary, 48 hours in Poland). The detainee without a charge is entitled to the same rights as the accused. Evidence gathered in the period preceding the formal charge is inadmissible in the court.

G. Alternatives to Pretrial Detention

The laws on criminal procedure in the countries under review envisage a number of measures intended to replace pretrial detention. Prohibition to leave the place of residence, withdrawal of the suspect's passport, and deposition of a certain amount of money are the most common alternatives to pretrial detention. However, in some of the countries not all suspects are entitled to the right to be released on bail or probation. Thus, in Romania, release on bail is available only for those charged with a criminal offense punishable with deprivation of liberty up to seven years and for those with a clean record. As reported, the number of those released on bail and on probation in Romania decreased dramatically since the last amendment of the Penal Code in 1996. Punishment for individual offenses was substantially increased whereas the seven years limit for probation and bail has not been

raised. In the Slovak Republic surety or other promises may not replace detention if there is a reasonable fear that the accused would hinder the investigation or when deprivation of liberty over eight years can be imposed.[17]

H. Defense Rights of the Accused and Right to Counsel

The right to counsel of an individual charged with a criminal offense is provided by the Constitutions of the countries under review, and the contents of the right is further detailed in the laws on criminal procedure. These include the right to be informed about the charge and the supporting evidence; the right to have access to the file of the case; the right to give explanations and the right to silence; the right to give evidence and to participate in the investigation; the right to be informed about the development of the investigation; the right to appeal all decisions that affect the defendant's position; the right to the assistance of a defense counsel; and the right to use one's mother tongue.[18]

The relevant provisions stress that the detainee (or the accused without detention) is entitled to the right to have a counsel from the very moment of arrest or when the charge is communicated. The right to counsel also includes the right of the defendant to choose freely the attorney and to withdraw authorization at any time. The right to choose freely the attorney, however, does not fully apply in *ex officio* appointment cases, although in many jurisdictions defendants may make submissions for the appointment of another attorney. As a general rule, the number of lawyers who may represent a client is not limited. In Poland, however, the defendant may not have more than three defense attorneys.

In principle, detained persons are entitled to meet their attorneys at any time it is necessary. The Romanian CCP, however, contains a restrictive provision which is at least questionable in the light of the case law of the organs of the European Convention of Human Rights. The law says that the accused may, at least in the earlier phase of the investigation, be prohibited from contacting his lawyer for up to five days "if the interests of justice so require." In spite of the clear provisions in Hungarian legislation, attorneys are confronted with difficulties when trying to contact their clients, as the

[17] Mandatory detention was recently abrogated in Poland.

[18] The Slovak CCP provides for some additional rights, such as to request the state attorney at any time during the interrogation that all unnecessary delays or defects in the procedure of the interrogation be removed..

practice of some prisons imposes certain restrictions on the right of the defendant to meet his lawyer.[19]

The Bulgarian, Czech and Hungarian legislation contains explicit provision regulating the right of defendants to confer in private with their attorneys. In spite of the clear provisions a number of cases has been reported from Hungary where detained individuals were prevented from communicating with their attorneys freely and without interference. In Bulgaria, the fact that the accused is deliberately prevented from meeting the defense counsel in private is not qualified as a procedural violation, unless it has an effect on the investigation. And, of course, it is extremely difficult to prove that the prison authorities deliberately prevented the counsel from meeting the detainee in private.

The Romanian CCP is silent on the right of defendants to meet their counsel in private. In practice detainees in Romania can meet their defense counsel only in the presence of a prison officer or the person conducting the investigation. The new Polish CCP authorizes the prosecutor to be present at the meetings of the detainee and his lawyer during the first 14 days of the preliminary investigations.

I. Consequences of Failure to Comply with the Obligation of Securing the Right to Defense Counsel and Other Defense Rights

With respect to guaranteeing the right of the accused to have a counsel the CCPs oblige the proceeding authorities[20] to inform the defendants of their rights, including the right to have the assistance of a defense counsel and to ensure for the defendants the free exercise of their rights.

The failure of the proceeding authorities to inform the defendants of their right to defense counsel is qualified in all jurisdictions as a serious misconduct. In Poland this may lead to the annulment of the verdict of guilt, but only in that case if the violation of the right has had an impact on the judgment. In Hungary the failure to provide information on the right to have a counsel can lead, at least in theory, to the exclusion of evidence. The Hungarian CCP states that evidence obtained in breach of the rules of the CCP

[19] Information provided by the report of the Parliamentary Ombudsman in Hungary and the jail monitoring program of COLPI and Hungarian Helsinki Committee.

[20] The authorities are the investigator or the prosecutor in the preliminary investigation and the court at the trial stage.

may not be used in the process.[21] However, in the light of Supreme Court decisions on the interpretation of the relevant section of CCP, it is more likely that the failure of the authorities will not result in the exclusion of the evidence; thus, statements made by the defendant without being previously informed about his right to counsel could be accepted as valid.

Consequences of the absence of the defense attorney from the procedural acts depend on whether the attorney's presence is mandatory or not. As a general rule, the presence of the defense counsel is obligatory during the trial if defense is mandatory. Failure to comply with the rule of mandatory presence leads to the nullity of the court judgment and the case is remanded for a new trial.

As to the investigation phase, the relevant provisions display a great variety. Hungary represents one extreme, since the authorities have the sole duty of notification, so it is left to the free choice of the attorney whether he attends the hearing or the other procedural acts or not, even in cases in which defense is mandatory. Therefore, the defense counsel is not required to be present at the hearing when the pretrial detention is decided upon (with the exception of juvenile cases) or when the defendant is informed of the charge brought against him. However, the authorities' failure to notify the defense counsel of the hearing, may result in the case being returned by the prosecutor for reinvestigation.

In contrast, strict rules apply in Romania and Bulgaria. In Romania the authorities are under the duty to inform the accused of the right to a defense counsel and they also must to see to it that the counsel should appear at the procedural acts at which his presence is necessary. Attendance by the defender is required at the hearing where decision is made on pretrial detention and when the defendant is informed of the charge against him. The absence of the defense counsel, however, does not frustrate the progress of investigation, as the proceeding authority may appoint ex officio an attorney if the retained counsel fails to appear at the hearing. The Supreme Court ruled that such acts should be considered void if the defendant lacked the assistance of an attorney. It also pointed out that if the defendant makes a written declaration waiving his right to counsel and the prosecutor proceeds with the interrogation, the statement has to be declared void since the right to counsel is a constitutional guarantee which may not be waived.

[21] In the Czech Republic evidence collected in the breach of the right to counsel may not be used in the trial.

Similar strict rules apply in Bulgaria, where the investigator is not allowed to continue the case if, after bringing the charge, he failed to inform the defendant of the right to a lawyer and if he failed to provide an opportunity to contact the defense counsel. In cases of mandatory defense or if the accused was previously not able to find a lawyer, the investigator is obliged to reschedule the service of the charge.

Concerning the acts of investigation which attorneys are entitled to attend, the rules indicate considerable differences among the countries covered by the review. In Bulgaria the defendant and his counsel have the right to attend the investigative procedure as a whole, but it is in the investigator's discretion to limit the right of attending the investigation "if the interests of investigation so require." The right of the accused and the defense attorney to be informed about the evidence supporting the charge is also subject to limitations. The CCP entitles the investigator to deny the disclosure of the evidence from the defense "if the interests of the investigation so require." In practical terms the defense is very seldom informed about the evidence gathered during the investigation. In Hungary, the CCP enumerates the investigative acts defense counsels are allowed to attend and empowers the proceeding agency to authorize attendance in situations not enumerated by the law.

III. LEGAL AID

A. Rules on Legal Aid Under the Constitutions and the Codes of Criminal Procedure

The Constitutions of the Central and Eastern European countries cognize the right to legal assistance in litigation before the courts and administrative bodies of the state. This formulation, however, simply obliges the authorities not to obstruct the exercise of the right to counsel. The Czech Charter on Fundamental Rights and Liberties envisages, in addition, free of charge legal aid under certain conditions and leaves the formulation of detailed rules to subsequent legislation. Accordingly, the CCP of the Czech Republic states that "defendants without sufficient means to pay the costs of the defense are entitled to a free defense or to a defense on a discounted reward." A similar provision is contained in the Slovak CCP which, in addition, requires attorneys to offer legal aid to the accused and to be conscious of their obligations, irrespective of whether the accused would pay or not. Defendants are entitled to file civil law suit for damages against the attorneys who failed to comply with this provision.

The Bulgarian, Hungarian, Polish and Romanian Constitutions and Codes on Criminal Procedure do not contain explicit provisions on the general right of indigent defendants to obtain free services, and the obligation of the state

to provide free legal assistance is limited to cases of mandatory defense. In most legislation, free attorney assistance can be provided if it is found necessary in the interest of justice. However, as reported from a number of countries, the relevant provisions are seldom invoked either by indigent defendants or the proceeding authorities. It goes without saying that the lack of recognizing the right of indigent defendants to free legal services runs counter the principle of equal treatment by the law, which is a universal principle of modern legal systems.

On the other hand, however, the proceeding authorities in many of the countries may grant, either ex officio or on the defendant's request, free legal aid outside the scope of mandatory defense if they find that the interests of justice so require, and they may take into consideration the financial resources of the defendant when passing decision on the subject.

For instance, in Hungary, the defendant may always ask for a lawyer to be appointed to represent him, albeit the proceeding authority is not bound by the request. It will appoint an attorney only if it considers the request to be justified.

In Poland the accused may ask the court to grant him free legal service. The applicant should prove his inability to pay the defense costs without affecting his family maintenance.[22] The situation is similar under Romanian law.[23]

In the Slovak Republic the indigent defendant may ask the court for free legal assistance. The court will consider the request with regard to the defendant's financial income, property and family status and may compensate him partly or in total. The defendant may also ask the attorney to give free legal assistance; if the lawyer finds that the defendant does not have sufficient means to pay the fees, he should provide free legal assistance as the right of the defendant to legal assistance guaranteed by the CCP is one of the rights lawyers should protect.

Until recently, the general understanding among the judicial circles in Bulgaria was that there was no obligation for the state to grant legal aid outside the scope of mandatory legal assistance. In 1996 the Supreme Court passed a judgment recognizing the right to free legal representation to indigent persons where the interests of justice so require. The Supreme Court

[22] Usually a written statement of the accused on his income suffices.

[23] However, it is not the court but the local bar council which makes the decision.

based its opinion to a large extent on the European Convention on Human Rights. The judgment notwithstanding the previous practice has not changed and the authorities (the investigator and the court) generally reject legal aid requests if the case falls outside the scope of the mandatory assistance.

Summing up, we may state that in spite of provisions authorizing the proceeding authorities to grant free legal aid outside the cases of mandatory defense, practice indicates that the proceeding authorities rarely find it necessary to make ex officio appointments, and indigent defendants seldom avail themselves of the opportunity of requesting that free legal aid be provided to them.

B. Free Legal Assistance in the Laws on the Bar

In some countries the obligation of providing free legal assistance is prescribed in the laws on the Bar. In comparison with the CCPs, these laws provide more detailed rules as to the conditions of granting free legal assistance. Nonetheless these provisions carry less weight, as they are not considered as procedural rules. Consequently, their infringement is not regarded to be a procedural violation resulting in the annulment of the judgment.

Under the Bulgarian Act on the Bar every attorney should give free legal assistance to indigent persons, relatives, friends and other lawyers and to persons seeking to enforce alimony rights. There are, however, no state or Bar supported funds and procedure to provide for payment in these cases. Refusal of lawyers to act in accordance with these provisions can subsequently be challenged before the disciplinary court of the Bar Association. However, no such complaint has ever been lodged.

In Romania indigent defendants may apply for free legal assistance to the local bar council. There are no strict financial or other criteria for legal aid to be granted. All personal and financial circumstances of the applicant, as well as the nature and the complexity of the case, are taken into consideration when the council passes decision.

Relatively stronger guarantees exist for the enforcement of the rules of the Acts on the Bar in the Czech and the Slovak Republics. Under the Czech Act on the Bar, if someone can not obtain legal assistance, he is entitled to ask the chamber of the bar association to appoint a lawyer for him. In order to justify his claim, the applicant has to give the names of at least two attorneys who have refused to provide legal assistance. The applicant is also required to submit a statement of his material background. In the Slovak Republic, the Act on the Bar provides that everyone is entitled to the right to legal aid and

to address such a request to any advocate. The attorney can refuse to give legal aid only for good reasons. The Chamber of the advocates will scrutinize the reasons of the refusal.

Free legal advice is also available in the Czech Republic. The Advocates Chamber provides legal assistance once a week in the building of the Chamber.

C. *Mandatory Defense in Criminal Cases*

As we have seen, free legal aid is granted to indigent defendants primarily in cases where the participation of a defense counsel in the criminal process is mandatory.

In the countries under review defense is mandatory under conditions when the defendant is seriously hindered in conducting his or her own defense or at least this can be presumed or when the criminal offense the defendant is charged with carries a relatively serious punishment. As to this latter condition, however, the legislation in the Central and Eastern European countries varies considerable. In the Czech Republic, in Romania, in the Slovak Republic and in Hungary any crime for which a sentence of imprisonment over five years can be imposed qualifies as a criminal offense serious enough to make the participation of a defense attorney obligatory, while in Bulgaria the minimum punishment has to be at least ten years for making defense mandatory.[24] It is primarily the severity of the punishment carried by the given criminal offense that justifies mandatory defense in cases in which higher courts (county courts in Hungary and regional courts in Poland) proceed as first instance courts.

As to the first group of cases, defense is normally mandatory if the person proceeded against is absent or detained for whatever reason, if the defendant is a juvenile or if his or her physical or mental handicap is likely to affect his or her ability to defend himself in person.[25] Mandatory defense is envisaged

[24] Under this condition defense is mandatory only at the trial stage in Romania and in the new Hungarian CCP.

[25] The minor defendant is entitled to mandatory legal assistance in Bulgaria, the Czech Republic, Hungary, Poland, Romania and the Slovak Republic. In the different countries different age limits are used to classify minor. While in Poland minor is a person younger than 17 years, in Bulgaria it is someone older than 14 but younger than 18 and in the Slovak Republic a minor is someone older than 15 but younger than 18. Minors are subject to criminal proceedings only if they are able to understand the essence and meaning of their actions and can control their actions.

in extradition proceedings, most likely for the reason that in many jurisdictions the individual concerned is automatically detained if his extradition is requested by another state. The participation of an attorney is also mandatory if the procedure involves complicated legal issues as it is the case with the extraordinary remedies or the procedure before the Constitutional Court. In the Czech Republic, for instance, defense is obligatory in cases of retrial and in the so called breach of law complaint submitted by the minister of justice in which he questions the legality of a criminal proceeding resulting in a final decision. Defense is also mandatory

The detention of the defendant is considered as a ground for mandatory legal assistance in Hungary, the Czech Republic, Romania and the Slovak Republic. A provision to this effect is also included in the new Polish Code of the Criminal Procedure. In the Czech and the Slovak Republics detention is considered to be including the holding in medical institutions with the aim of observing the defendant's mental state and the serving of a prison sentence.

As to the defendant's mental or physical condition, the Bulgarian CCP contains the terms "disabilities and illnesses" without specifying the particular diseases. According to the case law of the Supreme Court deafness, blindness and muteness certainly fall within this category. The Hungarian and Polish CCPs are more precise, they provide mandatory legal assistance if the person is blind, mute or deaf or otherwise physically or mentally handicapped. The Czech and the Slovak CCPs place emphasis on the legal consequences of probable mental disability - a person shall obtain mandatory defense if he is deprived of his legal capacity or if his capacity is limited; the Romanian CCP does not base mandatory defense on the physical or psychological health of the defendant.

In Bulgaria and Hungary defense is mandatory if the accused does not speak the language. The new Polish Code of Criminal Procedure contains the same provision. In Bulgaria this is not an absolute ground for mandatory defense. If the accused makes an explicit statement that he waives this right, the defense could not be considered as mandatory.

Investigation or trial procedure held in the absence of the defendant is an absolute ground for mandatory defense in Bulgaria, Hungary and the Czech and Slovak Republics.

Defense is also mandatory if the case is to be heard before the Regional court as a court of first instance in Poland.

If in the same process more than one person are charged who have adverse interests legal assistance is mandatory in Bulgaria. Legal representation of two defendants with adverse interests by one attorney is considered as lack of legal representation.

in proceedings before the Constitutional Court in which even the petition to the Court may be filed only by a member of the Bar.

In these instances the attorney's fees are paid by the state in Poland and in Romania. In Bulgaria, Hungary and the Slovak Republic the state will enforce its claim against the defendant in case of a verdict of guilty.[26] This regulation seems to run counter the provision laid down in article 6 para. (3)(c) of the ECHR and article 14 para. (3)(d) of the ICCPR. Both treaties envisage the assistance of an attorney if the interests of justice so require and in such cases they provide for free legal assistance for persons who do not have sufficient means to pay for it. It is evident that by formulating the conditions under which defense is mandatory, legislation defines the cases where the interests of justice by all means call for the assistance of a trained lawyer. From this it follows that compliance with international obligations would require *pro bono* assistance of attorneys in cases of mandatory defense. The new Hungarian Code of Criminal Procedure adopted on March 10, 1998, which will to enter into force on January 1, 2000, will bring Hungarian legislation in line with the country's international obligation. According to the new law, indigent offenders are relieved from paying attorneys' fees not only when defense is mandatory but also when, upon their request, the assistance of an attorney is granted even in cases in which the participation of a trained lawyer is not obligatory according to the law.

As treated above some legislation in the region also envisages cases outside the scope of mandatory defense where the assistance of a trained defender is inevitable. In Hungary, the CCP explicitly provides that if the defendant is unable to retain an attorney he may request that one be appointed ex officio. However, as it has already been mentioned, the final decision rests with the proceeding authorities who are not bound by the defendant's request. In some jurisdictions, courts may appoint a counsel also on their own initiative[27] if they find that proper defense calls for the assistance of a trained lawyer, for example, when the case is complicated or when the

[26] In the Czech Republic the convicted individual is required to reimburse the state unless he/she is entitled to free-of-charge defense. However, there exist no rules which would specify the situations to which the mentioned provision would apply. Therefore, determination is made on a case-by-case basis and there is no uniform court practice on the matter.

[27] See, for instance, Poland where the appellate court may decide that the defendant should be represented by an attorney at the appeal hearing.

defendant would be handicapped because the law does not make defense mandatory.[28]

In the Czech Republic, at least according to the practice of some of the judges, mandatory defense is extensive. If the indigent defendant requests free legal assistance, the judge would consider this as a case of mandatory defense even if not explicitly mentioned as such in the CCP, and would assign a lawyer as if it were a case of obligatory defense. This practice, which lacks the legislative underpinning is perhaps intended to counterbalance the deficiencies of the system envisaged by the law on the Bar. According to that law, individuals unable to retain an attorney of their choice may request the Bar Association to designate an attorney for them who would perform *pro bono* services. However, practice indicates that individuals seldom make use of this provision. The reluctance of the agencies acting in the criminal process (the police, the prosecutor and the courts) to inform the defendants of this opportunity, and the fact that some of their members are sometimes not even aware of the existence of the mentioned provision, raises the interesting question to what extent can certain tasks traditionally considered in the countries of the region to be the responsibility of the state, be assigned to an autonomous organ such as the Bar? The experience of the Czech Republic indicates that the preconditions for the smooth operation of this type of system are still lacking. On the one hand, the ethical standard (or rather a lack of it) within the Bar does not favor pro bono work, while on the other hand the "official" agencies of the criminal justice system seem to have serious reservations about the transfer to the Bar of tasks which traditionally are viewed as coming under their competence.[29]

D. The Consequences of Violating the Rules of Mandatory Defense

The participation of an attorney in the cases of mandatory defense is *conditio sine qua non* for the validity of the criminal proceeding. In Bulgaria, it is the established case law of the Supreme Court that the absence of a

[28] In Romania this provision applies not only to the accused and defendant, but also to the victim and the litigants, if a civil suit has been filed in the criminal proceeding. Provision requiring mandatory legal assistance for victims and for civil litigants in a criminal proceeding is also provided in the new Hungarian CCP.

[29] As concerns the Czech Republic, one should add that legal representation is obligatory before the Constitutional Court. Indigent applicants may ask full or partial compensation for the attorney's fee prior to the first hearing. This benefit is available only if the complaint is not rejected subsequently by the Constitutional Court. The fees are paid from the state budget.

counsel at any stage of the criminal proceeding when legal representation is mandatory is to be considered as a significant violation of the procedural rules, which serves as ground for quashing the conviction.

In Hungary, if the authority conducting the investigation fails to appoint a lawyer when legal assistance is mandatory, the trial court may remand the case for reinvestigation. If it is the first instance court which failed to appoint a defense counsel, the court of appeal should annul the conviction and remand the case for reconsideration to the court of first instance.[30]

One should add that the simple assignment of an attorney in cases of mandatory defense does not suffice; for proper implementation of the procedural rules the attorney's presence is important in all the procedural actions.[31] In Bulgaria and Romania the lack of legal representation in any of these actions is considered as a serious procedural violation and provides a ground for annulling the judgment.

E. The Payment of Ex Officio Appointed Counsels

For an attorney *ex officio* to be appointed what is crucial is not the indigence of the defendant but whether the case falls within the scope of mandatory legal assistance. In theory, the financial means of the defendant are irrelevant, although in practice it is mainly the indigent defendants who make recourse to the *ex officio* provision, as those able to cover the attorney's fees are likely to choose and retain a lawyer themselves.

As indicated above, *ex officio* attorneys' fees are always paid by the state budget in Poland and Romania, and there is no obligation for the defendant to reimburse the costs. However, this is not the case under the current legislation of Bulgaria, Hungary and the Slovak Republic. The appointment of an *ex officio* counsel does not relieve the defendant from his obligation to cover these fees; it has only the effect of postponement of the payment. In cases of mandatory legal assistance in Bulgaria, Hungary and the Slovak Republic, the attorney should receive his fees from the state budget, but if a verdict of guilt is returned, the state would enforce its claim against the defendant, irrespective of his financial status. If the defendant is acquitted,

[30] A similar situation prevails in Romania. If legal assistance is required by the law, the courts will remand the case for reinvestigation if the police or the prosecutor failed to comply with this requirement. In Poland the appellate court will annul the judgment, if legal assistance was not ensured in mandatory defense cases.

[31] Such as interrogations and other action requiring defendant's presence and serving the results of the investigation.

he should be released from the obligation to reimburse the state for the costs of the legal representation.

As a general rule, the fees of *ex officio* attorneys, whether appointed in cases of mandatory defense or outside, will be covered by the state budget.[32] In the Czech Republic, however, there is a Bar supported fund with the local chambers. This fund compensates the costs of legal services in cases outside of the scope of the mandatory legal assistance.

There are two policies for determining the fees for the *ex officio* appointed attorneys. The first provides that the *ex officio* lawyers are paid on an equal footing with the attorneys retained by the defendant.[33] According to the second method, fees considerably lower than those to be paid in case of defense on retainer are to be fixed by the National Bar Council and/or the Ministry of Justice.[34] In Romania the fees paid to the *ex officio* lawyers are even lower than the minimal limits of the fees of attorneys on retainer. In addition to the low fees in Hungary, neither costs of the contacts with detained defendants (unless the attorney has to travel to a place outside the seat of his office) nor the costs of a number of other activities are covered.

Late payment of the fees is a common problem in the six countries. The fees are paid after the final decision is served; in Bulgaria the payment is divided into two parts, for the preliminary investigation and for the trial stage, which may take years.

F. Legal Aid in Civil Cases

In the countries under review litigants in civil cases are entitled to several benefits promoting their access to courts in civil cases. First, in certain types of civil cases, such as labor disputes, alimony and other family cases, litigants are exempt from paying the costs of the administration of justice and, second, individuals may be granted legal aid for free or reduced tariff if they lack adequate resources irrespective of the type of the case.

In Hungary, persons who due to a lack of financial means are unable to pay the expenses of the proceedings are entitled to an exemption from paying

[32] This might be the budget of the uniform judicial branch, the budget of the Ministry of Justice or the budget of the appointing authority.

[33] This is the system adopted by the Czech Republic, Poland and the Slovak Republic.

[34] This is the case in Bulgaria, Hungary and Romania.

the court taxes and the costs of the proceedings; they are also entitled to the appointment of an attorney acting on their behalf as a free protector. The litigants have these rights if their income does not exceed the current minimum amount of an old-age pension and if they do not possess any property beyond what is necessary for the normal conduct of life.

In the Czech Republic and Poland, individuals unable to pay the court fees may apply to the court for exemption from the court fees. If the court finds the application well-founded, the litigant is entitled to ask for free legal assistance. In Poland the same rules apply to the cases before the Supreme Administrative Court, when the decisions of the administrative bodies on taxes and issues of refugee status are challenged.

In Romania, the litigants are entitled to free legal assistance if they cannot cover the costs of the trial without endangering their or their family's subsistence. The applications should be filed with the courts, although in cases of urgency it is possible to lodge the claim with the Dean of the local Bar association. The fees are paid from the budget of the Ministry of Justice and are much lower than the average fees for similar services.

In Bulgaria, the litigants in labor and alimony cases are exempt from the court fees. The courts may exempt indigent defendants from paying court fees in all civil cases. There is no provision, however, granting free legal aid in civil cases.

G. *Procedure for Appointing an Attorney*

In cases of mandatory defense the proceeding authorities are under the obligation to appoint a lawyer unless the accused had retained an attorney.[35] Any member of the Bar may be appointed as an *ex officio* lawyer. In Romania preference is given to junior attorneys which can be interpreted as a kind of admission that *ex officio* attorneys need not to be the most qualified and experienced lawyers. As to the procedure, again two methods are applied in the countries under review. In some of the countries the proceeding authority turns to the local Bar which designates the individual attorney, while in the others the appointment of the lawyer from a list submitted by the

[35] In the Czech and the Slovak Republics as well as in Hungary, the accused is given a deadline for retaining a lawyer, and only after its expiration a defense counsel *ex officio* is appointed. In other countries a simple statement of the defendant that he will not retain a counsel suffices.

Bar in advance is made directly by the proceeding authority.[36] As regards this second method concerns are voiced that the investigative authorities may appoint "friendly" attorneys who do not "cause complications."

Ex officio assigned lawyers should represent the defendants until the judgment becomes final, meaning that defendants are entitled to the services of the attorney during the appellate stage as well. After the judgment becomes final, *ex officio* appointment lapses. Consequently, the defendants may not make use of the attorneys's services in case of extraordinary remedies or when submitting complaints to international human rights tribunals.

IV. REFORMING THE PRESENT SYSTEM OF LEGAL AID

A. *The Application of the Rules on Legal Aid in Practice*

As to the operation of legal aid services it is the evaluation by the recipients that is of primary importance. The opinion of defendants on the services provided by *ex officio* appointed attorneys is rather negative; according to their experience, the performance of appointed lawyers does not even meet the minimum standards.

According to an inquiry carried out by the National Prison Administration among 1000 detainees, 67.7% of whom had an *ex officio* attorney, nearly half of the inquired individuals expressed their dissatisfaction with their defense counsel and blamed their attorney for insufficient contacts; the detainees' opinion was supported by the experience of the prison staff. According to the Romanian report, in the majority of the cases the legal representation is a mere formality, in interrogations *ex officio* lawyers sign written depositions without previously discussing the defense strategy with their clients and often without having studied the evidence gathered by the investigating agency. There are cases when lawyers allow their clients to admit crimes they are not even charged with. It is a common practice for the *ex officio* lawyers to meet their clients only at the court room.

In the Czech Republic, the major problem in practice seems to be the lack of confidence of the defendants in their *ex officio* lawyers. The appointed

[36] In Bulgaria and Romania the investigator (the prosecutor in Romania) or the court should refer to the local bar association to designate an attorney. The decision is taken *ad hoc* without any preliminary lists or rules. In Hungary the local lawyer's chamber is under obligation to ensure that their members would be available for the appointment. In Poland the court appoints *ex officio* attorneys using the list of the lawyers practicing in the district in an alphabetical order rotation.

attorneys are considered as tools of repression and the accused often refuse their assistance. Another problem is the attorneys' passive approach to the case: usually they are not likely to seek for extenuating or mitigating evidence or to work on different defense strategies.

The evaluation of attorneys and other jurists involved in the administration of justice is somewhat more favorable. The author of the Polish report states that *ex officio* assigned attorneys do their work accurately, although they rarely participate in the phase of investigation. According to an inquiry carried out in Bulgaria among attorneys, investigators and judges, some of the appointed lawyers are very diligent and do not only what is required as a minimum by the law but work on different strategies as well. The majority of the inquired jurists, however, expressed the view that most of the appointed attorneys will not do more than the minimum.

In cases of mandatory legal assistance there are at least certain rules which are designed to guarantee that defendants receive services of tolerable quality. No such rules exist, however, in cases falling outside the scope of mandatory defense. As the request of the defendant is not binding, the refusal of appointment would not lead to any procedural consequences. Although the attorney who contrary to the law refuses to provide free legal aid is subject to disciplinary action, the insignificant number of complaints lodged with the disciplinary bodies indicates that this mechanism may not be considered as an adequate guarantee of the right to free legal assistance.

B. Evaluation of the Present System

From the reports it is evident that the legal systems in the six Central and Eastern European countries subject to this report do not provide proper and adequate regulation of the right to legal aid. The right to free counsel is secured only in cases of mandatory legal assistance. It should be noted that in such cases free legal assistance is secured not with regard to the indigence of the defendant, but on the assumption that fair procedure in certain cases calls for the assistance of legally trained expert independent of the defendant's wish and his financial conditions. The regulation in Hungary and the Slovak Republic where the defendants entitled to mandatory legal assistance are under the obligation to reimburse the state for the costs of their legal representation, generally without respect to their financial status, seems to be incompatible with international human rights treaties.

The right to legal aid in cases outside the scope of mandatory defense is not explicitly recognized by the legislation of the Central and Eastern European countries and where it is recognized, no adequate safeguards are provided for its implementation.

The limitation of free legal assistance to cases of mandatory defense reflects the general attitude of the legal systems as regard the role of defense attorneys. It is not only the courts which are expected to perform their functions in an unbiased and impartial way, but also the prosecutors and the police acting as the investigating agency are supposed to act in an objective manner. Under this presumption the function of a defense attorney is marginal, his assistance is required only in cases where, for some reasons, the defendant is unable to represent himself on an average level. This is clearly indicated by the conditions which make defense mandatory, such as the defendant's physical or mental disability, his absence or his detention.

But even in cases of mandatory defense the legal systems do not attach much importance to the attorney's performance. This is openly acknowledged by the legal systems which allow or even prefer junior attorneys to take *ex officio* appointments. In countries where legislation is more reserved the low expectations as to the attorneys' performance are reflected in the low fees and other financial restrictions, delayed payments, etc. discouraging diligent and accurate work, and in the indifferences toward the quality of performance as far as incentives are concerned.

Taking into consideration that the majority of defendants who meet the requirements for mandatory defense come from social groups less likely to be able to retain an attorney of their choice, the provisions discouraging lawyers from performing diligent work lead to the absurd situation that it is exactly those who are in the greatest need of genuine aid, as they are handicapped or deprived of their liberty, that receive the poorest legal service.

It would certainly be an oversimplification to believe that by enacting these provisions, the decision makers consciously wished to ease the work of their crime control agencies. Nor do I believe that the serious deficiencies in the system of free legal assistance can simply be traced back to the economic problems the countries under review presently face or, more precisely, to the fact that in the course of distribution of the scarce resources the handicapped group of indigent defendants have little chance to realize their interests. The legal provisions disregarding the interests of defendants unable to retain a lawyer are more or less linked to the structure of and the philosophical assumptions underlying the criminal process in the countries of the region and this leads us to the analysis of the proposals for reform.

C. Recommendations for Reforms

It seems that there is a general agreement on the need of reforming the system of legal assistance for indigent defendants. The approaches to the reform, however, show a great variety. The contents of the proposals depend

on a number of factors, not the least on the status of those who formulate the recommendations. My impression is that attorneys themselves, who feel somewhat ashamed and have bad conscience because of the poor performance of the Bar in *ex officio* appointment cases but who are at the same time interested in preserving their monopoly in representing clients, prefer reforms which do not question the basic assumptions of the criminal justice system. They tend to propose a considerable increase of the fees, differentiation according to the amount of work done (payment by hour), and they would also suggest a more equal distribution of the burdens. Thus, in the report on Poland it is recommended to allow representation of indigent litigants in civil cases by legal advisers who for the time being are not permitted to act before the courts and thus relieve attorneys from some of their burden. In Hungary, some representatives of the Bar believe that by setting up a list of attorneys who are willing to take criminal cases on *ex officio* appointment and, at the same time, giving exclusive authorization to the attorneys on the list to take criminal cases in general, could considerably improve the quality of free legal services. Attorneys would even agree to impose more serious disciplinary sanctions on their colleagues for poor performance, if this is the price to be paid for maintaining the system.

Others, on the contrary, urge structural changes and argue that the traditional assumptions of the present system of criminal justice should be abandoned. They propose to set up legal clinics with the involvement of law students which, by necessity, would result in breaking the monopoly of attorneys to represent criminal defendants. The proposal, of course, raises the serious moral question whether one may take the risk of maintaining and even reinforcing the thesis that the needs of indigent defendants can be met by services of less qualified and inexperienced personnel. On the other hand, one could argue that the guidance of experienced lawyers supervising the students and the involvement of university professors would provide sufficient guarantees for acceptable quality. Or one could be more pragmatic arguing that legal clinics even with less experienced would-be lawyers can simply not provide poorer services than the present *ex officio* appointment system.

Proposals for establishing state finance legal aid services would also seriously deviate from the basic assumption according to which honest and effective defense can be performed exclusively by an independent Bar. Opponents to the setting up of state funded legal aid argue that defendants would never accept the services of lawyers employed by the state and would regard them as spies of the investigation agencies. Even if this seems to be somewhat exaggerated, the fact that in some countries even *ex officio* appointed lawyers who otherwise are members of the independent Bar are viewed as agents of the investigation organs indicates that the argument deserves serious consideration.

The proposal to consider any kind of violation of the right of indigent defendants including the ineffective performance of *ex officio* appointed attorneys, as a procedural infringement resulting in the annulment of the court judgment, would alter the traditional Continental approach according to which, as a general rule, only those breaches of law are to lead to annulment which significantly affect the outcome of the case.

The most radical proposals question the entire inquisitorial procedure and urge the shift to the adversary model. Their proponents believe that without the genuine separation of powers and functions between prosecutors and attorneys the position of indigent defendants may not be improved either. The myth of prosecutorial impartiality has to be abandoned and, consequently, the prosecuting agency should be relieved from the duty of collecting extenuating and mitigating evidence, an obligation it is simply unable to comply with. The present system in which the defense attorneys' activity of collecting evidence in favor of their clients is viewed as almost illegal should be altered. This, of course, would also call for significant improvement in the ethical standards of the Bar, as well as considerable changes in the training of attorneys, as they would have to acquire skills of collecting evidence or elaborating a variety of defense strategies, which skills, because of the passive role they are doomed to by the present system to play, they regard as superfluous.